PATRICIA C. ALKER

IBLA 84-158 Decided February 22, 1984

Appeal from an order of Administrative Law Judge E. Kendall Clarke dismissing appellant's appeal because the termination of the lease involved in the proceeding rendered the appeal moot.

Reversed

1. Oil and Gas Leases: Generally -- Rules of Practice: Appeals: Generally -- Rules of Practice: Appeals: Effect of -- Rules of Practice: Protests

   A protest to issuance of an oil and gas lease filed after the lease has issued is not timely. Where, however, the "protest" is filed by an individual with subsidiary priority such protest shall be deemed to be an appeal from the rejection of the protestant's application or offer to lease.

2. Oil and Gas Leases: Applications: Generally -- Rules of Practice: Appeals: Effect of

   The filing of an appeal from rejection of a lease offer or application preserves the viability of the offer or application during the pendency of the appeal. Thus, if it can be shown that the lease improperly issued to another party, the lease is properly canceled and may be awarded to the appellant.

3. Oil and Gas Leases: Applications: Generally -- Rules of Practice: Appeals: Effect of

   Where the lessee of an oil and gas lease fails to pay the annual rental, the lease is terminated. Such termination, however, does not moot an unadjudicated appeal challenging the issuance of the lease to the lessee. Appellant is entitled to an adjudication of her appeal. Upon a determination that the terminated lease was improperly issued to the lessee in the first instance, appellant as the first qualified applicant may be awarded the lease.

4. Evidence: Burden of Proof -- Evidence: Presumptions -- Oil and Gas Leases: Applications: Generally -- Rules of Practice: Evidence

   Where an issue in an appeal involving a simultaneous oil and gas lease application is the existence or nonexistence of an agreement between the lessee as priority applicant and her assignee which would have resulted in a violation of 43 CFR 3102.2-6(a) and (b), the lessee is the party with peculiar means and knowledge enabling her to show the nonexistence of such agreement. Failure or refusal to do so may give rise to an inference that the lessee's evidence is unfavorable.

APPEARANCES: R. Hugo C. Cotter, Esq., Albuquerque, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Patricia C. Alker appeals an order of Administrative Law Judge E. Kendall Clarke dismissing her appeal of a decision of the Nevada State Office, Bureau of Land Management (BLM), dated September 30, 1982, dismissing her protest against issuance of oil and gas lease, N-33329, to Anne Macheel. Macheel's simultaneous filing application was drawn first in the May 1981 drawing and the lease was issued effective July 1, 1981. Appellant, the second-qualified applicant, filed a protest on July 7, 1981, against issuance of the lease to Macheel, contending that Macheel was not the sole party in interest in her offer but rather she was acting on behalf of Barry Mohr, who also individually filed on the parcel, creating a multiple filing in violation of law. BLM denied the protest and appellant appealed that decision. In Patricia C. Alker, 62 IBLA 150 (1982), BLM's decision was set aside and the case was remanded for further inquiry or investigation on whether Macheel's application conformed to the requirements of 43 CFR 3102.2-6(a) and (b). In a decision dated September 7, 1982, BLM requested information from Macheel concerning assistance by Barry Mohr in the preparation of her application. Macheel responded that Mohr had merely recommended Metropolitan Marketing Services, a filing service, and that the application was completed according to directions from the filing service. Based on this response, BLM again dismissed appellant's protest against the issuance of the lease in a decision dated September 30, 1982. This second dismissal of appellant's protest by BLM was set aside by this Board in Patricia C. Alker, 70 IBLA 211 (1983), wherein this Board ordered a fact-finding hearing.

The record discloses that the matter was first set for hearing in San Diego on April 14, 1983. When the hearing convened neither Barry Mohr nor Anne Macheel was in attendance, although they were represented by counsel. Although subpoenas had been issued, they had not been served, apparently as the result of a misunderstanding. Judge Clarke continued the hearing for 30 days to allow the filing of motions.

Thereafter, new subpoenas were issued commanding the appearance of Mohr and Macheel at a hearing set for June 29, 1983, in San Diego, but when the hearing was again convened they were not present. It developed that again the subpoenas had not been served, although this time there had been an extensive

effort made to serve them. The process server's return indicated 11 visits to Anne Macheel's residence on eight different dates without contact. The return showed attempted service of Mohr by 9 visits to his home and one visit to his place of employment on nine different dates, without success. Service was last attempted on each of them on the night preceding the scheduled hearing.

At the hearing counsel for appellant explained this to Judge Clarke, adding, "The best I can tell, Your Honor, it would appear that they are both evading service." (Tr. 4).

Counsel for Mohr and Macheel appeared, and stated that his clients had been instructed to inform him if they were under subpoena, but they had not done so. He declined to stipulate that they would appear voluntarily at a hearing, saying that he had no authority to do so.

The second hearing was continued indefinitely without any evidence having been adduced, to be reconvened at a later time.

On July 1, 1983, the lease terminated by operation of law for the lessee's failure to remit the annual rental. No petition for reinstatement of the lease was filed with BLM.

Judge Clarke then ordered appellant's appeal dismissed on October 17, 1983. In doing so, he noted that the regulations at 43 CFR 3112.1-1 "require all leases which have been terminated to be subject to leasing under simultaneous oil and gas regulations. It appears therefore that the lands contained within N-33329 must be offered on the Notice and Posting of Lands subject to simultaneous oil and gas filings rather than being offered to the second drawee." He then ruled that the issue involved in the remanded proceeding was now moot and dismissed the appeal.

Appellant, in appealing the dismissal, contends that her rights have never been adjudicated and that it is, therefore, improper to dismiss her appeal in this case merely because Macheel failed to pay a lease rental. We agree.

[1] In a decision styled Goldie Skodras, 72 IBLA 120, 122 (1983), this Board noted in a similar factual situation that where a protest has been filed after the issuance of the lease, technically a protest was improper because a protest is an objection "to any action proposed to be taken." 43 CFR 4.450-2 (emphasis supplied). The decision at page 122 makes it clear, however, that a second drawee does have standing to appeal from the rejection of her application.

> The regulations provide that "when the lease is issued, to the first-qualified applicant, unsuccessful applicants selected with lower priority for the lease shall be notified in writing or by return of their application." 43 CFR 3112.3-1(e). Rejection of an application clearly gives the applicant standing to appeal. 43 CFR 4.410.

Goldie Skodras, supra at 122. Thus, while styled a "protest," BLM should have treated appellant's "protest" as an appeal.

The Skodras decision then continues by pointing out that whereas a timely protest would have stayed lease issuance, the filing of a notice of appeal likewise suspends the effect of the decision being appealed. Here, the actual decision being appealed was rejection of appellant's application, not issuance of the lease. This is a crucial distinction.

[2] The filing of an appeal from rejection of her application preserves the viability of appellant's application during the pendency of the appeal. Goldie Skodras, supra. If Macheel's application is found to have been defective, then appellant's second-drawn application may be accorded priority and the lease may be awarded to the appellant. In contradistinction, if appellant had not appealed the rejection of her application and the Macheel application had been found defective, the lease would have been canceled, but appellant could not have obtained it. Rather, it would be reposted on a new simultaneous listing.

[3] Here, however, while the appeal is still pending and therefore the appellant's application is still viable, the lessee Macheel failed to pay the annual rental and the subject lease terminated. Judge Clarke ordered appellant's appeal dismissed because he interpreted 43 CFR 3112.1-1 as requiring the lands under the subject lease to be reposted on a new simultaneous listing thus mooting this appeal. This was error. If such a theory prevailed, then a lease wrongly issued through fraud or error could never be issued to the applicant who was rightly entitled to receive in the first instance because it would have to be canceled or relinquished, and 43 CFR 3112.1-1 includes leases which are canceled or relinquished as well as those which have terminated or expired. An applicant who was wrongly denied a lease in such circumstances would have no administrative recourse.

If this appeal had not been filed or if this appeal had been adjudicated against the appellant, then Judge Clarke's conclusion would be correct. Judge Clarke has failed to recognize, however, that appellant's rights have intervened. There has been no finding that appellant's application was properly or improperly rejected. Appellant, in challenging the rejection of her application, is contending that she is the first-qualified applicant because of defects in lessee Macheel's application. She is entitled to a determination of her appeal. If it is determined that the terminated lease was improperly issued to the lessee Macheel, appellant as the second-drawn priority applicant may be awarded the lease. See 43 CFR 3112.6-3, 3112.3-1, 3112.-1(a).

Thus, appellant's appeal served to preserve her application; it had no effect on the issuance of the lease or the running of its term. See Goldie Skodras, supra. The fact that Macheel did not timely pay her rental, thus automatically terminating her lease, is an issue totally separate from that before us at this time; i.e., whether appellant was the first qualified applicant and therefor entitled to the lease.

[4] This Board continues to believe that a hearing would be the most appropriate way to resolve this appeal. We acknowledge, however, that appellant is at a distinct disadvantage in attempting to define the relationship between Macheel and Mohr, which is the central substantive issue of this appeal. Macheel and Mohr are in the best position to establish the nature of any agreement between them. Yet Macheel not only has not availed herself

of the opportunity to clarify her situation at the two hearings called by Judge Clarke, but Macheel let her lease terminate by not paying the annual rental. It would be an injustice to allow such evasive actions by the adverse parties to control and frustrate appellant's right to a determination of her appeal.

In Hal Carlson, Jr., 78 IBLA 333 (1984), this Board stated:

> It is a well accepted evidentiary principle that a litigant does not have the burden of establishing facts peculiarly within the knowledge of an adversary. Campbell v. United States, 365 U.S. 85, 96 (1961); Browzin v. Catholic University of America, 527 F.2d 843, 849 (D.C. Cir. 1975). Likewise, the burden of proving a fact is on the party who presumably has peculiar means of knowledge enabling him to prove its falsity, if it is false. Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25, 36 (7th Cir. 1975).

In this case, appellant has presented circumstances which she claims are indicative of an undisclosed prior arrangement between Macheel and Mohr. In Patricia C. Alker, supra, at 70 IBLA 212-13, we stated:

> In an affidavit, Henry A. Alker, appellant's husband, declares Macheel stated in a telephone conversation with him that Mohr had helped her in the preparation of her application. An assignment of the lease to Mohr was submitted to BLM on August 25, 1981, a short time after execution of the lease form, and for only one-fourth of one percent (0.25%) overriding royalty, a small amount in relation to usual market transactions. Macheel made the assignment to Mohr despite a paid-for marketing service available to her as a result of her arrangement with Metropolitan Marketing Services. Appellant also points out that Macheel has submitted her street address to BLM spelled three different ways and suggests that this reveals that she did not prepare all that has been submitted, but rather, has been assisted by others who may have interests in the lease.

The efforts of the Government and appellant to resolve this matter on a firm evidentiary basis have been foiled by the failure to secure the testimony of Macheel and Mohr. Both the Government and appellant have expended considerable time, effort and money in the process. Now Macheel and Mohr voluntarily have been divested of any interest in the subject matter of this proceeding. It is doubtful whether a remand to the Hearings Division would prove any more productive of hard evidence than the previous endeavors. Under the circumstances, with no party other than appellant asserting a right to the lease, a further expenditure of resources is unwarranted.

Appellant has raised doubts which need to be resolved. As Macheel and Mohr have failed or refused to clarify those doubts at the hearings, the adverse inference rule may be applied. That rule provides that when a party has relevant evidence within its control which it fails to produce, when it would be expected to do so under the circumstances, such failure may give rise to an inference that the evidence is unfavorable. Hal Carlson, Jr.,

supra at 341, citing International Union (UAW) v. NLRB, 459 F.2d 1329, 1335-38 (D.C. Cir. 1972). We conclude that a preponderance of the evidence in this case favors appellant's position, and find such evidence to be unrebutted.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the order appealed from is reversed and the lease will be awarded to appellant, all else being regular.

Edward W. Stuebing
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Gail M. Frazier
Administrative Judge